500 (1883); *M. D. Reynolds* v. *London & Lancashire Fire Ins. Co.*, 129 Cal. 16, 60 Pac. 467 (1900). These cases stress the time at which the loss occurred as establishing the right of the insured and the liability of the insurer. The plaintiff in the present case is in an even more favorable position. The loss occurred at a time when there was no question about the plaintiff's status as a mortgagee and his interest as such was injured. Therefore, the plaintiff's right and the defendant's liability are established and any subsequent change of position between the plaintiff and the mortgagor, who is not here concerned, should not release the defendant from liability, nor preclude the plaintiff from suing on his cause of action.

The Alabama Court, in holding as it did above, is consistent with the majority of the Alabama cases which have any bearing on the present question. But in attempting to be consistent and to keep the plaintiff from recovering after foreclosure the court has lost sight of the real issue of the case, namely, that the liability of the insurer became fixed at a time when the insured could claim under the policy. Since the mortgagee may recover only its interest in the policy as such interest may appear, namely, to the extent of the deficiency judgment, the insurance company would lose nothing by the court's permitting this action.

EVA MAE PARKER

INTERPLEADER

LIMITATIONS ON STATUTORY INTERPLEADER

The plaintiff sued the defendant to recover a real estate commission based on a written contract. The defendant without answering moved for an order of interpleader under section 11265 Ohio G.C. The defendant alleges in his affidavit that a third party claims the commission for the same sale. The latter's claim is on an implied contract. The interpleader was denied because the contracts were not of the same nature and there might be liability on the part of the defendant to each of the claimants. *The William V. Ebersole Co.* v. *Julius Payton*, 31 O.N.P. (N.S.) 190 (1933).

Section 11265 of the Ohio General Code provides: "Upon affidavit of a defendant before answer, in an action upon contract, or for the recovery of personal property, that *a third party, without collusion* with him, *has or makes a claim* to the subject of the action, and that he is *ready to pay or dispose of it*, as the court directs, . . . shall be allowed to become defendant in the action, in lieu of the original defendant, who

shall be discharged from all liabilities . . . ." The Supreme Court of Ohio, and courts in a great number of other states having a similar statute, have required of this statutory interpleader elements that are not specifically mentioned in the statute. The true bill of interpleader granted in equity required the following as essentials in a bill: (1) Claim to the same debt, thing or duty. (2) Privity. (3) No claim by applicant in the subject matter. (4) No independent liability created by applicant. (5) Two claimants with meritorious claims. (6) Affidavit of non collusion. (7) Payment of res into court. (8) No responsibility of applicant for his precarious position and ownership of res not determinable without hazard to applicant. *State* v. *U. S. Fidelity and Guaranty Co., et al.*, 107 O.S. 9, 140 N.E. 657 (1923); *Prudential Ins. Co. of America* v. *Ostrom*, 274 Ill. App. 241 (1934). The Ohio statutory interpleader includes at least the last four requirements. The case of *State* v. *U. S. Fidelity and Guaranty Co., et al., supra*, held that the first four requirements were also necessary. See 37 Harvard Law Rev. 388 for a criticism of this opinion.

The following cases clearly show the attitude of courts toward statutory interpleader. In the dictum in the case of *Walters* v. *Corlett, Admx., et al.*, 123 Ohio St. 632, 176 N.E. 565 (1931), the court said: "While interpleader is in some measure regulated by the code, its essential principles find their origin in the common law, and have not been modified in the least by statutory regulations." *Pfister et al* v. *Harry Wade et al.* 56 Cal. 43 (1880). This action of statutory interpleader does not supersede the action of interpleader, it is merely a concurrent remedy. *Hoyt* v. *Gouge*, 125 Iowa 603, 101 N.W. 464 (1904); *Northwestern Ins. Co.* v. *Kidder*, 162 Ind. 382, 70 N.E. 489, 66 L.R.A. 89 (1904); *Stewart* v. *Sample*, 168 Ala. 270, 53 So. 182 (1910). Section 820 of the Code of Civil Procedure in New York, which is similar to section 11265 Ohio G.C. was held by the majority of the court in the case of *Pouch* v. *The Prudential Ins. Co. of America*, 204 N.Y. 28; 97 N.E. 731 (1912) not to create a new ground for interpleader, but to enable a defendant to bring in as a party defendant, in a summary way, the adverse claimant, and is governed by the same rules of equitable interpleader.

Many courts have eliminated the first four requirements or at least have been more liberal in determining when these requirements are present in a given case. The remaining requirements are sound and necessary, because of the very nature of the remedy of interpleader. The doctrine of privity got into equity from the old common law interpleader by an historical accident. 2 Reeves, History of English Law,

635-640; *Crawshay* v. *Thornton*, 2 Nyl. and Cr. 1, 40 Eng. Rep. 541 (1837). Chaffee, Modernizing Interpleader, 30 Yale L.J. 814 (1921). England has by statute eliminated the requirement of privity. Common Law Procedure Act (1860). Courts in the United States have either eliminated or lessened the requirement of privity. In the case of *Sewanee Fuel & Iron Co.* v. *Leonard*, 139 Tenn. 648, 202 S.W. 928 (1917), the court *waiving* the old rule of privity would not maintain the bill of interpleader because the complainant was wrongdoer. The privity rule is binding in absence of statutory enactment, but this rule should only apply when the title of one claimant is wholly paramount to and independent from the others. *First Nat'l Bank* v. *Reynolds*, 127 Me. 340, 143 A. 266 (1928). Interpleader was allowed where no privity existed. *Platte Valley State Bank* v. *National Live Stock Bank*, 155 Ill. 250, 40 N.E. 621 (1895). The above cases show a liberal trend toward the requirement of privity, without the necessity of statute, and therefore by statute the same result could be obtained. If all claimants claim from a common source this is sufficient privity. *Crane* v. *McDonald*, 118 N. Y. 648, 23 N.E. 991 (1890).

The principal case refused interpleader because the contracts were not of the same nature. This requirement of the same debt, thing, or duty has been treated by courts in the same manner as the doctrine of privity. The Ohio courts have read this requirement into the statute. *State* v. *U. S. Fidelity and Guaranty Co. et al.*, *supra*. Courts have held the expression "the same thing, debt, or duty," to mean that there must not be a variance in the amounts claimed. *Pfister* v. *Wade*, *supra*; *Andrews* v. *Travelers Ins. Co.*, 145 Ga. 472, 89 S.E. 522 (1916). An Oregon case very similar to the principal case, refused interpleader. It was held that one of the requirements was the right to the same specific fund. *Maxwell* v. *Frazier*, 52 Or. 183, 96 Pac. 548, 18 L.R.A. (N.S.) 102 (1908). The case of *Enterprise Lumber Co. et al.* v. *First Nat. Bank*, 181 Ala. 338, 61 So. 930 (1913), granted interpleader although some of the claimants wanted the whole res, and others only a part. Suppose the domicile of a party is in dispute, and he is in danger of paying taxes to different counties or states. Should interpleader be denied? Here strictly speaking, the duty is not the same. Interpleader was denied where applicants did not claim the same duty. *Rauch et al.* v. *Ft. Dearborn Nat'l Bank*, 223 Ill. 507, 79 N.E. 273, 11 L.R.A. (N.S.) 545. Interpleader was granted on different forms of action. *March* v. *Mutual Life Ins. Co.* 200 Ala. 438, 76 So. 370 (1917). It is immaterial if some of the claims are actionable at law, and others in equity. *Iles* v. *Heidenreich*, 202 Ill. App. 1 (1916). Inter-

pleader was allowed although claims did not arise from the same contract. *Boyle* v. *Manion*, 74 Miss. 572, 21 So. 530 (1896). This entire topic is treated in the excellent article by Professor Chafee, *supra.* in which he concluded that the matter of claiming the same debt should be treated more liberally.

One might argue that statutory interpleader "in action upon contract, or for recovery of personal property," is to be used only in law actions, since actions for money due, or damages for the breach of contract and for replevin, were law actions. *Bridge* v. *Martin*, 2 Ohio Dec. Rep. 410 (1860). Therefore the narrow common law interpleader should govern the requirements of the statutory interpleader, since its jurisdiction is a purely statutory one. But assuming that it was intended to apply only to law actions, it should not be restricted in its application by the old common law requirements. It is doubtful whether the Legislature intended to require the common law essentials. The case of *Boyle* v. *Manion, supra,* expresses a preferable view. The court said that the intention of the Legislature was to enlarge the scope of interpleader and have the rights of the parties adjudicated on the basis of the merits of the case. In the Ohio Statute of the eight requirements of equitable interpleader, four are in some manner mentioned. Did the Legislature intend that the other four be included? The Ohio courts have included them. It seems reasonable that if all eight "requirements" were intended to be necessary, the Legislature would have so stated, instead of mentioning only certain ones.

Because of the limited facts given in the principal case, one cannot determine whether the applicant was responsible for his own precarious position. He might possibly have created contractual liability to two parties, knowing full well the results of his acts. This factor by itself would be sufficient basis for denying any relief of interpleader.

SAM TOPOLOSKY

NEGOTIABLE INSTRUMENTS

SET-OFF AS A DEFENSE UNDER THE N. I. L.

The plaintiff executed a note and mortgage to a bank. After maturity the bank indorsed and assigned the note and mortgage to the defendant insurance company. At the time of the transfer the plaintiff had on deposit in the bank a larger sum than the balance then due upon the note. No notice of the transfer was given to the plaintiff until after the bank had closed its doors. The plaintiff prayed that his deposit be